

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**TERESA A. COULTER,
Petitioner**

**vs.) No. 100836 (BOR Appeal No. 2043962)
(Claim No. 2002051450)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
and KANAWHA COUNTY BOARD
OF EDUCATION, Respondent**

FILED
June 9, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated June 4, 2010, in which the Board reversed a December 4, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's November 7, 2008 Order, which denied Ms. Coulter's request to reopen her claim for consideration of temporary total disability benefits. The appeal was timely filed by the petitioner, and the West Virginia Office of Insurance Commissioner ("WVOIC") filed a response. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Revised Rule 1(d), this matter should be, and hereby is, set for consideration under the Revised Rules of Appellate Procedure. Having considered the parties' submissions and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In reversing the Office of Judges, the Board of Review concluded that Ms. Coulter's "claim [was] barred for consideration of additional temporary total disability benefits by the five-year limitation set forth in West Virginia Code § 23-4-16." (June 4, 2010 Board of Review Order, p. 2.) In doing so, the Board reinstated the November 7, 2008, claims

administrator's denial of Ms. Coulter's request to reopen her claim. Ms. Coulter was initially granted a 7% permanent partial disability award on August 8, 2003, for a compensable left shoulder injury. Thus, the Board determined that her request for reopening should have been made by August 8, 2008. Ms. Coulter acknowledges that W.Va. Code § 23-4-16(a)(2) provides that "in any claim in which an award of permanent disability was made, any request must be made within five years of the date of the initial award." She argues, however, that her case is unique in that her request for reopening centered upon a left knee injury that she incurred while undergoing physical therapy for her compensable shoulder injury. Ms. Coulter's knee injury did not become a part of her claim until September 18, 2007.

Upon review of the record, the Court finds that the decision of the Board of Review was based upon a mischaracterization of the evidentiary record. In concluding that Ms. Coulter's request to reopen her claim was barred due to West Virginia Code § 23-4-16, the Board ignored the fact that Ms. Coulter's knee injury occurred as a separate injury while she was receiving physical therapy for the compensable injury of her right shoulder. As stated, Ms. Coulter's knee injury did not become a part of the claim until September 18, 2007, at which time her knee replacement was authorized. Ms. Coulter had a total knee replacement on August 4, 2008, and requested temporary total disability from August 4, 2008, through January 16, 2009. As the Office of Judges explained in its December 4, 2009, Order,

this situation poses a unique situation in that the claimant sustained a new injury when she fell and injured her left knee while in physical therapy for the compensable injury. By Office of Judges Decision dated September 18, 2007, the total knee replacement was authorized, and the claimant had the total left knee replacement surgery on August 4, 2008. It is therefore found that the claimant is entitled to a reopening of the claim for temporary total disability benefits as a new secondary component/condition of the claim was authorized (left knee surgery) by Office of Judges Decision dated September 18, 2007. The claimant had the left knee surgery on August 4, 2008.

(December 4, 2009, Office of Judges Order, p. 5). The Court agrees with the Office of Judges that "the claimant is entitled to temporary total disability benefits for the period of August 4, 2008, through January 16, 2009," and therefore finds that the Board of Review erred when it reversed the decision of the Office of Judges and reinstated the decision of the claims administrator.

For foregoing reasons, the final order of the Board of Review dated June 4, 2010, is reversed, and this case is remanded to the Board of Review to reinstate the December 4, 2009, order of the Office of Judges which found that the claim should be reopened for temporary total disability benefits, and that temporary total disability benefits should be paid for the period of August 4, 2008, through January 16, 2009.

Reversed and remanded.

ISSUED: June 9, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh